

Sept. 20, 1977

STATE OF NEW HAMPSHIRE  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CONCORD CITY EMPLOYEES - Local #1580  
American Federation of State, County and Municipal  
Employees - AFL - CIO

and

Case No. A-0417:1

CITY OF CONCORD, NEW HAMPSHIRE

77-27

APPEARANCES

CITY OF CONCORD, NEW HAMPSHIRE: Paul F. Cavanaugh, City Solicitor,  
Joseph C. Musumeci, Personnel Director, Thomas F. Dwyer, Assistant City  
Director

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO:  
Attorney James Barry, James C. Anderson, President

WITNESSES: J. Harvey Russell and Warren J. Miner

FINDINGS

On April 20, 1977 petition was filed before this Board by Local 1580 AFSME  
against the City of Concord alleging as follows:

- A. The City of Concord had refused to accept a grievance from a member of Local 1580 AFSME on February 25, 1977.
- B. On or about March 9, 1977, AFSME received an answer from the Public Works Director, Ronald Ford, stating that the grievance was refused on the basis that Mr. William Flad, in the eyes of the Public Employer, was a temporary employee and not entitled to recourse under the contract.
- C. Petitioner further stated that the grievant in this case had been employed by the City of Concord in excess of twelve months and, therefore, could not be considered a temporary employee, with the City further contending that the grievant, Mr. William Flad, was not a public employee under the terms of New Hampshire Statute 273-A:5.

A hearing in this matter was conducted on June 10, 1977, Room 306,  
Legislative Office Building.

William G. Flad testified that he had been a permanent employee for the City of Concord from June 1967 until February 28, 1975 at which time his employment was terminated by resignation.

William G. Flad was employed by the City of Concord as a temporary maintenance foreman on January 12, 1976. The application for this employment specifically listed the title of the position as Temporary Maintenance Foreman.

Testimony by Flad at the hearing indicated at the time of his hiring in February of 1976 that he was rehired and his position would be the same as that held prior to his resignation. Flad further indicated that he was never told that it was to be a temporary position.

As a temporary employee, Flad's normal raise in the form of a yearly increment was tabled and the recommendation by Mr. Forrestal, then Superintendent, City Highways, indicated that his recommendation for the increase was returned and marked with a "hold".

Flad did receive certain holiday pay in 1976 and when he inquired about certain other fringe benefits, was advised that he was not a permanent employee and was temporarily employed only.

Evidence at the hearing indicated that Flad had been employed on a full-time basis since his rehiring on January 12, 1976 and has, in fact, filled in on occasions for supervisory personnel in the Public Works Department, testimony to competence and capability.

On February 22, 1977 William Flad signed an official grievance form against the Public Works Department alleging that he had been denied certain benefits as required by law as an employee of the City of Concord.

On March 8, 1977 a memorandum from the City Solicitor, Paul F. Cavanaugh, to Ronald H. Ford, Director of Public Works, recommended to Ford that the grievance request be denied on the basis that Flad is a temporary employee and, thereby, excluded from resorting to the benefits of the contract grievance procedure and, further, that because of his alleged temporary status, Flad was not an eligible member of the bargaining unit. The City, through its counsel, Mr. Cavanaugh, recommended that the City not accept the grievance from Local 1580.

On March 9, 1977 Ronald H. Ford, Director of Public Works, directed a letter to Warren J. Miner, the Shop Steward of AFSCME Local 1580, stating that he concurred with the memo from the City Solicitor, Mr. Cavanaugh, and further denied the grievance.

Evidence indicated Flad was re-employed on January 12, 1976 and has, in fact, been employed full-time since that period consisting of some eighteen months.

RSA 273-A specifically addresses itself to the subject of temporary and probationary employees.

273-A:1 Section IX (d)

"Persons in a probationary or temporary status, or employed seasonally, irregularly or on call. For the purposes of this chapter, however, no employee shall be determined to be in a probationary status who shall have been employed for more

than twelve months or who has an individual contract with his employer, nor shall any employee be determined to be in a temporary status solely by reason of the source of funding of the position in which he is employed."

Evidence indicated that there had been a certain amount of inaction on the part of the City relative to determining the temporary status of Flad's employment.

Testimony indicated that there had been certain relationships between the Director of Public Works, Ford, and Flad regarding commitments outside of the usual employment, which led to the failure to resolve Flad's temporary status. This testimony made reference to a requirement of Flad to attend certain extra curricular meetings, which are considered to be outside the course of his normal employment.

All evidence indicated Flad was a capable person in his work effort in all respects.

William G. Flad did not learn that he was still in a temporary status until June of 1976 and alleged that he was never advised in writing that he was still temporary until he was told orally in June of 1976. On this subject there appeared to be substantial conflicting testimony as to the oral instruction given Flad in this case.

While the Board considered the City's Charter, which permits the City Manager to designate certain positions temporary in nature and the strong argument advanced by City Counsel Cavanaugh that the City was within its rights in classifying Flad's position as temporary, it was not sufficiently persuasive. If this argument was accepted in its conclusion the City could deny on a selective basis any employee's rights to Union membership, which appears to the Board to deny employee rights of representation and organizational membership which are specifically granted upon public employees under RSA-273-A.

Testimony brought out that Flad is a member of Local 1580.

ORDER

1. The Board finds that William G. Flad does in fact meet the test of being a public employee under RSA 273-A and can be a member of the bargaining unit.
2. The Board finds the City of Concord guilty of Unfair Labor Practices in accordance with RSA 273-A:5 in that it failed to process a grievance in accordance with the established grievance procedure existing between the City of Concord and Local 1580.
3. The Board orders the City of Concord to process a grievance in the case of William G. Flad in accordance with existing contract procedures.

Signed September 20, 1977

  
EDWARD J. HASELTINE, CHAIRMAN  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Vote unanimous. Members Cummings, Allman, Chairman Haseltine voting; member Moriarty abstaining; absent member, Anderson.